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Nos. 80-1434, 80-1439, and 80-1632

In the Supreme Court of the United States

OCTOBER TERM, 1980

MISSOURI—KANSAS—TEXAS RAILROAD COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PEOPLE OF THE STATE OF ILLINOIS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

LAWRENCE H. RICHMOND
Attorney

Interstate Commerce Commission
Washington, D.C. 20423

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may decline to prohibit or condition a rail merger that promises substantial public benefits where it determines that essential services to the public will not be lost.

2. Whether substantial evidence supported the Commission's refusal to impose special protective conditions, in addition to those actually imposed, for the benefit of a railroad not a party to the proposed merger.

3. Whether the Commission's invocation and application of concededly valid, but new, policies against imposing certain conditions on rail mergers denied due process to a railroad not a party to the merger that would have been benefited by such conditions.

4. Whether the Commission and the court of appeals correctly concluded that the employee protection provisions of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 11347, require protection only for the employees of the merging railroads.

5. Whether the Commission's imposition of extensive conditions for the protection of the employees of the merging railroads satisfied its obligation to consider the interests of rail laborers in evaluating the proposed merger.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A85)[1] is reported at 632 F.2d 392. The opinion of the Interstate Commerce Commission (Pet. App. A86–A485) is reported at 360 I.C.C. 784.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1980. The petitions for a writ of certiorari were filed on Monday, February 23, 1981. The cross-petition for a writ of certiorari (No. 80–1632) was filed on March 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1977, Burlington Northern, Inc. (BN) and the St. Louis-San Francisco Railway Company (Frisco) agreed to merge. BN and Frisco applied to the Interstate Commerce Commission for authority to consummate the merger, as required by 49 U.S.C. (Supp. III) 11343. Petitioners Missouri-Kansas-Texas Railroad Company (Katy) and Railway Labor Executives' Association (RLEA) and the Illinois cross-petitioners were among the 33 parties who participated in the ensuing Commission proceeding.[2]

Petitioner Katy urged the Commission to deny the merger application (Pet. App. A167–A168). In the

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[1] "Pet. App." refers to the appendix to the petition in No. 80–1434.

[2] Fourteen other railroads, three government agencies (including the United States Department of Justice), and two other labor organizations also participated (Pet. App. A94–A95). In addition, the record included the verified statements of 26 shippers (*id.* at A274–A283). The Commission proceeding lasted almost two and one half years, involved 46 days of oral hearing and generated a record comprising 8370 pages (*id.* at A96).

alternative, petitioner Katy requested that BN/Frisco be required to idemnify Katy, through 1997, for any loss of net income resulting from diversion of traffic to the merged system (*id.* at A175–A176, A464–A465). Petitioner Katy also requested imposition of permanent conditions to insure continuing Katy participation in joint-line traffic with BN and Frisco (*id.* at A177, A465–A466).[3] Petitioner RLEA asked the Commission either to deny the merger or to approve it with conditions for the protection of railroad employees (*id.* at A228–A230). Petitioner RLEA requested that protection not be confined to employees of BN and Frisco, but be extended to the employees of any carriers affected by the merger (*id.* at A229). The Illinois cross-petitioners noted several concerns as to the effect of the proposed merger on rail service in that state.

The Commission carefully reviewed the proposed merger. As required by 49 U.S.C. (Supp. III) 11344(b), the Commission examined the merger's effect on the adequacy of transportation for the public, the effect of including other railroads, the total fixed charges that would result, and the interests of affected employees (Pet. App. A234, A238–A244, A247, A249–A253). The Commission took into account the National Transportation Policy, 49 U.S.C. (Supp. III) 10101, and considered the merger's impact on competition and on the environment (*id.* at A235, A244–A249). In this merger proceeding, the Commission applied, for the first time, the policy on railroad mergers it had announced in *Railroad Consolidation Procedures*, 359 I.C.C. 195, 199 (1978) (Pet. App. A236). That policy statement detailed the host of criteria the Commission considers when deciding whether a railroad merger is consistent with the public interest. One of the relevant factors is whether essential

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[3] Joint-line traffic is traffic handled by more than one railroad.

rail services will continue to be provided, by either the consolidating companies or other railroads that may be affected by the merger.[4] In its decision approving the BN/Frisco merger, the Commission also listed the criteria it will consider when deciding whether to condition its approval of a proposed merger (Pet. App. A254)[5] and remarked that no condition would be imposed unless it had been sought by a protestant (*ibid.*). The Commission also stated, for the first time, that it would not impose indemnity conditions "under any circumstances" (*id.* at A255–A256).

The Commission determined that the BN/Frisco merger, with certain conditions,[6] was consistent with the public interest (Pet. App. A238, A263). It found that the merger would bring substantial public benefits without loss of essential services (*id.* at A238–A242, A244) and would not diminish competition (*id.* at A244–A247). The

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[4] The other factors listed in the policy statement are:

> Whether the opportunities to achieve operating efficiencies will be increased; whether redundant facilities will be eliminated; whether the ability of the consolidated system to attract new business will be enhanced; whether the consolidated company will be financially viable; whether effective inter- and intramodal competition will be maintained wherever economic realities make it possible; and whether there will be any adverse impact on the environment of the region served.

359 I.C.C. at 199.

[5] The Commission stated (Pet. App. A254):

> We do not believe that a merger should be conditioned unless essential services have been shown to be affected and the condition: (1) is shown to be related to the impact of the merger * * *; (2) is to enable shippers to receive adequate service; (3) will not provide a windfall to the carrier; (4) would not pose operating or other problems for the newly merged company; and (5) would not frustrate the ability of the merged company to carry out its objectives.

[6] See pages 5–6, *infra*.

Commission approved the labor protection agreements negotiated by BN and Frisco with the representatives of their employees (*id.* at A250–A251) and imposed the "*New York Dock* Conditions" for the protection of those employees of BN and Frisco who did not enter into negotiated agreements prior to the merger's consummation (*id.* at A250).[7]

Among the conditions imposed by the Commission for the benefit of railroads not participating in the merger were the so-called "DT&I Conditions," which ensure that a merged railroad (1) will continue to handle the interconnecting traffic of other railroads with the same neutrality as before the merger, rather than favoring its new partner at the expense of another railroad, and (2) will not eliminate routes or rates previously maintained with a competing railroad without the Commission's approval (Pet. App. A22, A260, A482–A483).[8] The DT&I Conditions were imposed for the period of two years, but the Commission retained jurisdiction to modify or extend them upon a showing by any party that the public interest would be served thereby (*id.* at A260, A483).[9] The Commission denied petitioner Katy's re-

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[7] The "*New York Dock* Conditions" were developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, aff'd, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[8] The "DT&I Conditions" take their name from the first case in which they were imposed, *Detroit, Toledo & Ironton R.R.—Control*, 275 I.C.C. 455 (1950).

[9] The Commission also imposed, for a period of two years, certain conditions negotiated between the merging railroads and the Kansas City Southern Railway Company, Southern Railway System, Southern Pacific Transportation Company, Union Pacific Railroad Company, and Chicago and Northwestern Transportation Company (Pet. App. A260–A261). The Commission declined, however, to impose some of the conditions agreed to by the BN/Frisco and the Southern Pacific Transportation Company (*id.* at A260).

quests for additional special conditions because its indemnity proposal was unacceptable in principle and because the Commission concluded that the losses the merger would impose on Katy would not impair Katy's ability to render essential services (*id.* at A256, A257–A258). Like the other railroad protestants, however, petitioner Katy received the benefit of the "DT&I Conditions" for two years following consummation of the merger.

The Commission rejected petitioner RLEA's request for protection for the employees of railroads other than BN and Frisco, concluding that 49 U.S.C. (Supp. III) 11347 does not require imposition of such conditions (Pet. App. A252–A253).

2. The court of appeals affirmed the Commission's decision in all respects (Pet. App. A1–A85).[10] The court concluded that the Commission's use of the "essential services" standard to determine whether to approve the merger or impose protective conditions was "perfectly appropriate under [49 U.S.C. (Supp. III)] § 11344(b)(1) and any of the other broad statutory standards" (Pet. App. A40). The court observed that the Commission's new policy reflected exactly the kind of sensitive reevaluation of the public interest Congress intended the Commission to undertake and that the Commission had adequately explained its departure from prior policy (*id.* at A28–A44).

The court of appeals rejected contentions that the Commission's imposition of "DT&I Conditions" for only two years following consummation of the merger undercut the adequacy of the evidence supporting approval of the merger (Pet. App. A50). Moreover, the court noted that the only possible impact of the initial decision to

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[10] In addition to the petitioners and cross-petitioners herein, Soo Line Railroad Company and the Kansas City Board of Trade sought judicial review (Pet. App. A4).

limit the "DT&I Conditions" to two years might be upon any subsequent review of the need for extending the life of conditions to protect competing carriers (*id.* at A51–A52). Inasmuch as the Commission's continuing jurisdiction and independent authority under the Interstate Commerce Act provide the Commission with complete authority to respond to meritorious claims for protection from any affected carrier, the court found that imposing "DT&I Conditions" for only two years did not undermine the Commission's ability to project competing carriers' needs for additional protection (*id.* at A57–A58).

Turning to petitioner Katy's request for special conditions, the court of appeals found ample evidence to support the Commission's finding that Katy could survive the merger without losing its ability to render "essential services" (Pet. App. A61–A63). The court also rejected petitioner Katy's argument that the Commission's application of the new policies against indemnity and unrequested conditions denied Katy due process (*id.* at A65–A72). The court found that the Commission adequately explained both policies and that petitioner Katy's reliance on indemnity was misplaced (*id.* at A67–A71).[11] Moreover, even if not misplaced, petitioner Katy's reliance on indemnity did not impose substantial adverse consequences because Katy may petition the Commission in the future for additional protective conditions (*id.* at A71).

Regarding employee protection, the court of appeals held that the language of 49 U.S.C. (Supp. III) 11347, the applicable legislative history, and Congress' implicit approval of the Commission's policy on employee protec-

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[11] The Commission's finding that petitioner Katy needed no special protective conditions led the court of appeals to question whether the Commission had even applied the new policies against indemnity and unrequested conditions in this case (Pet. App. A66, A70–A71).

tion established the correctness of the Commission's view that Section 11347 requires protection only for the employees of the merging carriers (Pet. App. A74–A81). The court also rejected petitioner RLEA's contention that the Commission's decision considered the issue of employee protection in the wrong sequence (*id.* at A81–A83).

ARGUMENT

The careful opinion of the court of appeals, upon which we rely, correctly affirmed the Commission's decision to approve the merger of BN and Frisco without imposing the additional traffic protection conditions sought by petitioner Katy or the additional employee protection conditions sought by petitioner RLEA. This case rests largely on its own particular facts and presents no conflict with the decisions of this Court or any other court of appeals.[12] Further review is not warranted.

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[12] The United States Court of Appeals for the Fourth Circuit recently reviewed the Commission's approval of a proposed railroad control transaction in *Norfolk & W. Ry.* v. *United States*, 639 F.2d 1096 (1981). In that proceeding the Commission had determined that no "DT&I Conditions" should be imposed, without affording the parties an opportunity to adduce evidence to demonstrate that they were needed. The court of appeals affirmed the Commission's approval of the transaction itself, but remanded the case to the Commission to permit competing railroads to make an evidentiary showing on the need to impose "DT&I Conditions" for their benefit.

No petitioner herein suggests that the Commission's decision to impose "DT&I Conditions" for only two years was error justifying review by this Court. Petitioner Katy's arguments with respect to the two-year imposition of "DT&I Conditions" are confined to the limitation's effect on the probative value of the evidence supporting the Commission's conclusion that petitioner Katy requires no additional protection (Pet. 48). Thus, the issue upon which the court of appeals in *Norfolk & W. Ry.* remanded is not raised in this Court. In any event, the decisions of the two courts of appeals are not in conflict because both recognized that

1. Petitioner Katy and the Illinois cross-petitioners principally contend that the court of appeals erroneously held that the Commission's "essential services" standard is consistent with the statutory guidelines applicable to the BN/Frisco merger. Petitioner Katy argues (Pet. 32–33) that use of the "essential services" standard to determine whether to protect railroads adversely affected by a merger violates the National Transportation Policy, 49 U.S.C. (Supp. III) 10101, and amounts to use of an invidious "double standard." Cross-petitioners argue (80–1632 Pet. 8) that, because the "essential services" standard applies to mergers prosecuted under 49 U.S.C. (Supp. III) 11346, it was error to apply the standard to the BN/Frisco merger, which was governed by 49 U.S.C. (Supp. III) 11344. These contentions are insubstantial.

The Interstate Commerce Act establishes the following standard for approval of a proposed merger: "The Commission shall approve [a merger] * * * when it finds the transaction is consistent with the public interest." 49 U.S.C. (Supp. III) 11344(c). In its proceedings the Commission is directed to consider the four factors set out in 49 U.S.C. (Supp. III) 11344(b), and the policies of the antitrust laws. *United States* v. *ICC*, 396 U.S. 491, 504 (1970). How these factors are balanced, however, is for the Commission to determine. *Penn-Central Merger Cases*, 389 U.S. 486, 498–499 (1968); *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385 U.S. 57, 68–69 (1966). As the court of appeals observed (Pet. App. A35-A37), the "essential services" standard applied by the Commission is a permissible component of

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competing railroads must be given an opportunity to develop evidence on the need for "DT&I Conditions." In the BN/Frisco case, the Commission met that requirement by imposing "DT&I Conditions" for two years after consummation of the merger, permitting carriers to submit evidence on the need for extending the conditions (Pet. App. A57–A58).

the public interest review mandated by statute. It neither conflicts with the mandate to *consider* the "adequacy of transportation to the public," 49 U.S.C. (Supp. III) 11344(b)(1), nor impermissibly infuses any incompatible aspect of review of mergers subject to 49 U.S.C. (Supp. III) 11346 into the review process (Pet. App. A35-A40).[13]

Petitioner Katy's suggestion (Pet. 27) that the Commission employed an impermissible "double standard" is frivolous. Rather, the Commission has simply exercised its authority to assess the public interest, *Penn-Central Merger Cases*, *supra*, 389 U.S. at 499, by specifying an operational criterion applicable to all affected parties in an even-handed manner. In reality, the thrust of Katy's complaint is that the Commission's "essential services" standard focuses upon the "*public* interest," 49 U.S.C. (Supp. III) 11344(c), and the "adequacy of transportation to the *public*," 49 U.S.C. (Supp. III) 11344(b)(1) (emphasis added), rather than upon the welfare of particular corporate entities (see Pet. App. A255); *Railroad Consolidation Procedures*, 359 I.C.C. 195, 199–200 (1978). In past railroad merger proceedings, the Commission's balancing of public interest factors led it to deny or condition a merger if any competing railroad would be harmed by the transactions. See, *e.g.*, *Chicago & N.W.—Control*, 347 I.C.C. 556 (1974); *Illinois Central Gulf R.R.*—

[13] Because the BN/Frisco merger was decided under 49 U.S.C. (Supp. III) 11344, and because the "essential services" standard is an appropriate analytical tool for use in judging mergers governed by that provision, it is irrelevant whether the "essential services" standard may also be used to determine the public interest under the more lenient procedures of 49 U.S.C. (Supp. III) 11346. Accordingly, there is no merit to cross-petitioners' contention (80–1632 Pet. 10) that the court of appeals erroneously "lifted" the "essential services" standard from 49 U.S.C. (Supp. III) 11346. See Pet. App. A35-A36 & nn.24, 25.

Acquisition—Gulf M. & O., 338 I.C.C. 805 (1971); *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475 (1966). In the BN/Frisco proceeding, however, the Commission applied the new balancing of the public interest factors announced in 1978, *Railroad Consolidation Procedures*, *supra*, 359 I.C.C. at 199–200,[14] under which the Commission will not deny or condition a merger offering substantial benefits to the public unless the public would otherwise lose "essential services" (Pet. App. A39-A40).

Petitioner Katy has cited no authority to support its contention that the Commission must continue balancing the public interest factors in the same way it has in the past.[15] Indeed, this Court's decisions fully support the Commission's decision to adopt a view of the public interest different from that held in the past. As the court of appeals noted (Pet. App. A40), the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Associations* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). The Commission's determination that the public will be better served if competing railroads are less shielded from the effects of the competition offered by strong merged carriers is consistent with this Court's view of the Commission's broad discretion under the statutory guidelines. *Penn-Central Merger Cases*, *supra*, 389 U.S. at 498–499.[16]

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[14] This policy was first published in proposed form, providing for consideration of comments from interested parties, at 43 Fed. Reg. 15753 (1978).

[15] Petitioner Katy asserts instead (Pet. 32–33) that, in using the "essential services" standard, the Commission ignored the National Transportation Policy. This assertion is without foundation for the reasons stated by the court of appeals (Pet. App. A38-A39).

[16] Petitioner Katy erroneously urges (Pet. 19–23) that the court of appeals erred by permitting the Commission to approve

2. Petitioner Katy also contends (Pet. 34–53) that there is no substantial evidence to support the Commission's finding that (1) petitioner Katy can survive the expected annual loss of $8.75 million in gross revenues and (2) the gross annual revenue losses will not exceed $8.75 million. These factual contentions were correctly rejected by the court of appeals.

a. In its proceeding, the Commission carefully analyzed the evidence concerning petitioner Katy to determine if the merger's expected effect on that railroad required disapproval of the merger or special protective

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the proposed merger without considering, as 49 U.S.C. (Supp. III) 11344(b)(1) requires, the merger's effect on adequacy of transportation. The court of appeals clearly recognized that the statute mandates consideration of the adequacy of transportation (Pet. App. A5-A6, A20) and the Commission extensively considered that factor (*id.* at A238-A244). Nor is there any merit to petitioner Katy's claim (Pet. 19–23) that either the Commission or the court of appeals impermissibly bifurcated its inquiry. The Commission's ultimate conclusion that the merger is consistent with the public interest rested, *inter alia*, on the conditions it imposed (*id.* at A263). And the court of appeals plainly recognized that that ultimate conclusion rested upon "subsidiary findings, conclusions, and orders of the Commission" challenged by petitioner Katy (*id.* at A24).

The Illinois cross-petitioners' contention (80–1632 Pet. 10–11) that the Commission inadequately analyzed the competitive impact of the merger because it made no specific findings respecting the alleged tendency of the BN/Frisco merger to induce other mergers in the future is groundless. As the court of appeals noted (Pet. App. A73), the Commission concluded that the merger would not diminish competition, and the cross-petitioners have not argued that that conclusion is incorrect. At root, the cross-petitioners' challenge is to the agency's decision to structure its proceedings and render its decisions in the usual case by case fashion. No statute commands adoption of the approach urged by cross-petitioners, and hence judicial interference with such administrative prerogatives is inappropriate. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543, 548 (1978); *Steadman* v. *SEC*, No. 79–1266 (Feb. 25, 1981), slip op. 13.

conditions (Pet. App. A167-A178, A386-A394). The Commission concluded (*id.* at A257–A258, A260) that imposition of "DT&I Conditions" for two years following consummation of the merger would adequately protect petitioner Katy. Given these facts, the court of appeals correctly rejected (*id.* at A60-A64) petitioner Katy's claim that the Commission had misjudged the railroad's prospects. Consistent with this Court's decisions in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *United States* v. *ICC*, 396 U.S. 491, 516 (1970); and *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28–29 (1961), the court of appeals held (Pet. App. A60) that the Commission was not required to make specific findings in the course of making future projections. But the court of appeals also found (*id.* at A61) that the Commission's decision was in fact supported by "very reliable evidence"[17] and that, in any event, petitioner Katy has a complete remedy if the Commission's projections prove to be wrong (*id.* at A63-A64). Hence, there is no reason for this Court to reweigh evidence that the court of appeals has already closely examined. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

b. The Commission's determination of the merger's effect on petitioner Katy was necessarily a prediction of uncertain events. In such circumstances, complete factual support for the Commission's prediction is not required because "'a forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 814, quoting *FPC* v. *Transcontinen-*

[17] The evidence offered by petitioner Katy's own witnesses before the agency supported the Commission's conclusion (Pet. App. A62).

tal Gas Pipe Line Corp., *supra*, 365 U.S. at 29. The court of appeals found (Pet. App. A49), and petitioner Katy does not seriously challenge, that the Commision had reliable evidence to support its conclusions on the merger's effects during the first two years after consummation. This evidence clearly indicated that petitioner Katy could survive the merger without the special protective conditions it requested. As to subsequent years, the court of appeals noted (*id.* at A55) that petitioner Katy can reduce diversions by responding competitively to the new competition from BN/Frisco. The court also found (*id.* at A46, A54) that the Interstate Commerce Act provides petitioner Katy with most of the protection offered by the "DT&I Conditions." The Commission thus preserved petitioner Katy's opportunity to demonstrate the need for additional conditions based upon actual, instead of predicted, facts. Given these circumstances, the court of appeals correctly held (*id.* at A56-A57) that the Commission had an adequate basis to gauge petitioner Katy's economic future and need for protective conditions. Petitioner Katy's demand for additional protection rests, in the final analysis, upon the view that the Interstate Commerce Act grants it perpetual rights to maintain its existing level of traffic, irrespective of whether competing carriers offer more attractive service to the public. There is no basis in the statute for such insulation from the competitive pressures of the market.

3. Petitioner Katy's final contention (Pet. 54–64) is that the Commission's application of new, but concededly valid, policies restricting imposition of unrequested conditions and indemnity conditions worked a denial of due process. The court of appeals found (Pet. App. A70-A71), however, that the Commission had not applied the new policies to petitioner Katy because the Commission's denial of the requested protective condi-

tions rested on the finding that petitioner did not need the conditions. Despite its protestations, petitioner Katy effectively acknowledges (Pet. 59 n.18) that application of the new policies was not essential to the Commission's decision to deny the special protective conditions. Accordingly, there is no occasion for this Court to consider whether the Commission's practice was in any respect unlawful.[18]

Even if the Commission's decision rested solely on the new policies, no error was committed. This Court has repeatedly held that an agency may formulate and apply policies in adjudications, as long as the agency's action comports with basic fairness. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292–294 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202–204 (1947). The court of appeals correctly found (Pet. App. A70-A71) that the balance of equities did not favor petitioner Katy. Petitioner Katy had no reasonable basis to believe that the Commission would accept its indemnity request, which would have imposed an unprecedented burden on the merged company. The Commission had imposed indemnity conditions only twice in its entire history, and then only in extraordinary circumstances involving a clear showing that protection was necessary (*id.* at A71).[19] Here, petitioner Katy failed to make a compelling showing that it needed protection.

In any event, the court of appeals correctly observed (Pet. App. A71) that the Commission's refusal to grant

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[18] Petitioner Katy has never identified any unrequested condition that should have been considered. Moreover, contrary to petitioner Katy's suggestion (Pet. 54), Katy did obtain protective relief in the form of imposition of the "DT&I Conditions."

[19] *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, 532 (1966) (indemnity imposed during pendency of further proceedings); and *Chicago & N.W. Ry.—Control*, 347 I.C.C. 556, 634–637 (1974) (indemnity imposed "to a limited extent [5 years] and as a last resort").

that condition did not substantially and adversely affect petitioner because the Commission gave petitioner the benefit of "DT&I Conditions" for two years and the right to seek such further protection as it could justify. See *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 295. Thus, there is no merit to petitioner Katy's argument that the court of appeals has sanctioned unfair retroactive application of an administrative regulation. On the contrary, it is petitioner Katy that would unreasonably freeze the evolution of the Commission's policy and procedures by perpetuating application of burdensome conditions unrelated to the public interest far into the future.

4. Petitioner RLEA's principal contention (80–1439 Pet. 9–15) is that, pursuant to 49 U.S.C. (Supp. III) 11347, the Commission was obliged to condition approval of the merger upon implementation of conditions to protect the jobs of employees of railroads affected by, but not parties to, the merger. The contrary ruling of the Commission (Pet. App. A251-A253) and the court of appeals (*id.* at A75-A81) is not inconsistent with any decision of this Court or any other court of appeals and is supported by the weight of district court authority.[20] See *Florida East Coast Ry.* v. *United States*, 259 F.Supp. 993, 1019 (M.D. Fla. 1966), dismissed as moot, 386 U.S. 544 (1967); *Railway Labor Executives' Ass'n* v. *United States*, 226 F. Supp. 521, 525 (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964). Petitioner RLEA relies instead on the contrary decision in *Soo Line R.R.* v. *United States*, 280 F. Supp. 907 (D. Minn.

[20] The decision below is the first to address the question of the scope of labor protection mandated by 49 U.S.C. (Supp. III) 11347 since the shift in jurisdiction to review Commission orders from three-judge district courts to the courts of appeals in 1975. See Pub. L. No. 93–584, 88 Stat. 1917. Should another court of appeals reach a different result in subsequent litigation, there will be time enough for this Court to consider whether further review is warranted.

1968), which interprets the words "railroad employees" in 49 U.S.C. (Supp. III) 11347 to encompass all employees of any railroad affected by a merger, rather than merely the employees of the merging carriers and their subsidiaries.[21] But the decision below is more faithful to the statute than is the district court's decision in *Soo Line*.

As the court of appeals noted (Pet. App. A81 n.50), the *Soo Line* court erred by failing to consider the complete text of Section 11347, or its predecessor, 49 U.S.C. (1970 ed.) 5(2)(f). The second sentence of Section 11347 provides that protective arrangements "may be made by the rail carrier and the authorized representative of its employees," instead of by the Commission. The court of appeals observed (Pet. App. A77-A78):

> It is difficult to imagine that when Congress wrote this sentence it was contemplating that a nonmerging carrier would agree to protect its employees from the merger of two competing carriers.

The court thus concluded that the Commission had properly inferred that the first sentence of Section 11347, which prescribes the imposition of conditions by the Commission, had coordinate scope (*id.* at A78, A80).

Petitioner RLEA's suggestion (80–1439 Pet. 13–15) that the court of appeals was led astray by consulting the 1978 recodification of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 11347, instead of the former 49 U.S.C. 5(2)(f), is unfounded. The concluding sentence of the earlier text, cited by petitioner RLEA (80–1439

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[21] Contrary to petitioner RLEA's implication (80–1439 Pet. 7 n.3), *Railway Labor Executives' Ass'n* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963), does not support petitioner's position, but rests, as the court of appeals noted (Pet. App. A76 n.46), on the special facts of that case.

Pet. 14) suggested, just as the present version does, that protective conditions are to be limited to the employees of the merging carriers. Petitioner's observation that the 1978 recodification was intended to work no substantive change undercuts its own contention, because the plain indication of congressional intent embodied in the recodified statute serves to clarify the ambiguity that petitioner struggles to introduce into the earlier version of the statute.

Contrary to petitioner RLEA's contentions (80–1439 Pet. 12–13), Congress made no changes in the former 49 U.S.C. 5(2)(f) in 1976, when it amended the Interstate Commerce Act,[22] or in the 1972 amendment to the Rail Passenger Service Act, 45 U.S.C. 565, that in any way suggest that protection was to be extended to employees of non-merging carriers. First, Section 11347 and its predecessor, Section 5(2)(f), incorporate by reference only the level of protection afforded by 45 U.S.C. 565 and not the definition of employees covered. In any event, the 1972 amendment extended protection under the Rail Passenger Service Act only to employees of "terminal companies" and not to the employees of non-merging railroads. Finally, the labor protection conditions imposed by the Commission in this proceeding were those developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 89 (1979), which include the provision for coverage of employees of independently incorporated terminal companies derived from "Appendix C-1, Article III," the standard labor protection conditions imposed under the amended Rail Passenger Service Act. *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 86–91.

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[22] Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, 90 Stat. 62.

Accordingly, the Commission fully complied with the mandate of 49 U.S.C. (Supp. III) 11347.[23]

The Commission has consistently interpreted 49 U.S.C. (Supp. III) 11347 and its predecessor as requiring protection only for employees of the merging carriers (see Pet. App. A75 & n.44). This longstanding administrative interpretation is entitled to substantial deference, as the court of appeals recognized. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This is especially so where, as here, Congress has re-enacted the statute without pertinent change. *NLRB* v. *Bell Aerospace Co.*, *supra*, 416 U.S. at 275. Accordingly, absent a conflict among the circuits, there is no warrant for further review on this point.

5. Petitioner RLEA also contends (80–1439 Pet. 15–18) that it was impermissible for the Commission to discuss conditions to be imposed for the benefit of employees (Pet. App. A249-A253) *after* having discussed other aspects of the merits of the merger application. But, as the court of appeals observed (*id.* at A82-A83), 49 U.S.C. (Supp. III) 11344(b) does not require the Commission to follow any particular order in considering the various factors that figure in its overall assessment of the public interest. Accordingly, the court of appeals properly refrained from imposing upon the Commission its own notions, or petitioner's notions, of how the discussion ought to be structured. *Vermont*

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[23] In any event, the independently incorporated terminal companies covered by Article III of Appendix C-1 are only those wholly or partially owned by merger applicants. Such employees, Congress evidently believed, are entitled to protection as though they were technically employees of a merging carrier, irrespective of the device of separate incorporation. Accordingly, the inclusion of terminal company employees within the labor protection mandate of the Act provides no support for extending such benefits to employees of wholly independent carriers.

Yankee Nuclear Power Corp. v. *NRDC*, *supra*, 435 U.S. at 543, 548.

In any event, as the court of appeals noted (Pet. App. A83 n.52), the Commission did review the impact of the merger on railway employees prior to stating its approval of the merger itself (see, *e.g.*, *id.* at A175, A184, A200). And the Commission's ultimate finding that the merger was in the public interest explicitly rested upon the conditions imposed, including the labor protection conditions (*id.* at A263, A482, A485). The Commission's decision was based upon a careful examination of the effect of the merger on all employees, which revealed that there was no factual reason to block the merger or impose additional conditions for the protection of employees (*id.* at A82-A83). Hence, there is no support for petitioner RLEA's assertion that the Commission violated Section 11344(b)(4) by failing to consider the "interest of carrier employees affected" by the merger.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

LAWRENCE H. RICHMOND
Attorney
Interstate Commerce Commission

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